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IN THE

Supreme Court of the United States

October Term, 1953.

No. 688

RAYMOND O'KEEFE, ANTONIO ROMEO, KEISER JOSEPH, DEMETRIUS SARACENO, MARTIN MONDOLFI, LOUIS FIATO and JOSEPH CAPALACES,
Petitioners,

v.

PEOPLE OF THE STATE OF NEW YORK,
Respondent.

Petition for a Writ of Certiorari to the County Court of Broome County of the State of New York.

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Petition for a Writ of Certiorari to the County Court of Broome County of the State of New York.

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners pray that a writ of certiorari issue to review the decision of the Court of Appeals of the State of New York, rendered November 20, 1953, affirming the decision of the Appellate Division, Third Judicial Department, of the Supreme Court of the State of New York, rendered March 21, 1953, which affirmed judgments of conviction in the County Court of Broome County of the State of New York, entered on June 13, 1951.

Opinions Below.

Memorandum opinion of the County Court of Broome County, State of New York, on defendants' motions to set aside the verdict is unreported (R. 3579-3580). The opinions of the Appellate Division, Third Judicial Department, State of New York, are reported as follows: on original argument (R. 3640-3657), 280 App. Div. 546, 115 N. Y. S. 2d 740; allowing re-argument (R. 3618-3620), 281 App. Div. 774, 119 N. Y. S. 2d 823; on re-argument (R. 3622-3634), 281 App. Div. 409, 120 N. Y. S. 2d 349. There were no opinions by the New York Court of Appeals; the affirmance by the Court of Appeals of the decision on re-argument of the Appellate Division is reported in 306 N. Y. 619 (R. 3782-3783); the New York Court of Appeals order denying petitioners' motion for re-argument and granting motion for amendment of the remittitur is reported in 306 N. Y. 744 (R. 3784-3785).

Jurisdiction.

1. The jurisdiction of this Court is invoked under 28 U. S. C. §1257(3).

2. The final decision of the New York Court of Appeals was rendered, without opinion, on November 20, 1953 (R. 3782-3783). Petitioners thereafter timely moved for re-argument or, in the alternative, for amendment of the remittitur to show that questions of due process under the Fourteenth Amendment to the United States Constitution were presented and passed upon by the Court of Appeals (R. 3783-3784). On January 21, 1954, the New York Court of Appeals denied petitioners' motion insofar as it sought re-argument, but granted the motion insofar as it sought amendment of the remittitur (R. 3784-

3785). The Court of Appeals ordered that the remittitur be amended by adding thereto the following:

> Questions under the Federal Constitution were presented and necessarily passed upon by the Court of Appeals, viz: as to whether the rights of the defendants to due process under the Fourteenth Amendment were violated by certain communications between the County Judge and jurors, and by refusal of the County Court to grant to defendant O'Keefe a further adjournment of the trial. The Court of Appeals held that there was no denial of any constitutional right of any defendant.

3. The following cases are believed to sustain the jurisdiction of this Court:

Howard v. Kentucky, 200 U. S. 164.
Frank v. Mangum, 237 U. S. 309.
Powell v. Alabama, 287 U. S. 45.
Snyder v. Massachusetts, 291 U. S. 97.
Avery v. Alabama, 308 U. S. 444.

Questions Presented.

1. Whether, in a state prosecution for felony, the *ex parte* examination of a sworn juror by the trial court in chambers to inquire into the qualifications of such juror, without notice to defendant or his counsel, and without stenographic record being made of the examination, violates the right of the defendant to due process under the Fourteenth Amendment to the United States Constitution?

2. Whether, if the right of a defendant to due process under the Fourteenth Amendment to the United States Constitution is violated by such an *ex parte* examination of a sworn juror, is such right waived, the juror being permitted to remain on the jury, where the trial court expressly consents to a reservation by defense counsel

of the right to make any appropriate motion with respect to the *ex parte* examination at the close of the trial, and an appropriate motion is made after verdict and first available opportunity to inquire of the juror as to such examination?

3. Whether, in a state prosecution for felony, an *ex parte* conversation between the trial court and the foreman of the jury, without notice to defendant or his counsel, and without stenographic record being made of the conversation, which is explained by the trial court as being in reference to the right of the jury to take certain exhibits into the jury room during their deliberations, violates the right of the defendant to due process under the Fourteenth Amendment to the United States Constitution?

4. Whether, if the right of a defendant to due process under the Fourteenth Amendment to the United States Constitution is violated by such an *ex parte* conversation between the trial court and the foreman of the jury, such right is waived by a failure to object thereto until after verdict?

5. Whether, under the particular facts and circumstances of this case, the right of the petitioner Raymond O'Keefe to due process under the Fourteenth Amendment to the United States Constitution was violated by refusal of the trial court to adjourn the trial for the period necessary for newly added defense counsel to adequately prepare for trial?

6. Whether, under the particular facts and circumstances of this case, the rights of the petitioners other than O'Keefe to due process under the Fourteenth Amendment to the United States Constitution were violated by refusal of the trial court either to adjourn the trial for the period necessary for O'Keefe's newly added defense coun-

sel to adequately prepare for trial, or to grant a severance to such petitioners, because of prejudice resulting to them by being compelled to undergo joint trial with a defendant unprepared?

7. Whether, under the particular facts and circumstances of this case, the cumulative effect of the errors complained of was a trial which violated the rights of the petitioners to due process under the Fourteenth Amendment to the United States Constitution?

Statement of the Case.

The petitioners were tried, beginning March 12, 1951, in the Broome County Court upon an indictment, filed June 16, 1950, which originally contained 102 counts against 18 persons named as defendants (R. 17-358). In addition, the indictment named some 15 persons and others unknown as co-conspirators. Two misdemeanor counts against all of the petitioners charged conspiracy to obstruct justice, and to commit bribery, by protecting gambling, under Section 580, subdivisions 6 and 1, respectively, of the New York Penal Law. The remaining 100 counts were felony counts, 54 for bribery, and 46 for officer receiving unlawful fees, under Sections 372 and 1826 of the Penal Law, respectively. Petitioner O'Keefe was originally charged in 98 of the 100 felony counts; petitioner Romeo in 75; petitioner Joseph in 61; petitioner Mondolfi in 37; petitioners Capalaces and Saraceno each in 4; and petitioner Fiato in 2.

At the time the above indictment was returned, petitioner O'Keefe was represented by one John Dapolito, who, in the fall of 1950, resigned his right to practice law in New York while disbarment proceedings were pending against him (R. 444). O'Keefe was unsuccessful in obtaining other counsel until March 2, 1951 (R. 445, 447),

although the date of March 5, 1951, had been set for trial. On March 2, 1951, O'Keefe moved for an adjournment to enable his counsel, John LoPinto, just that date retained, to adequately prepare his defense (R. 442-443). The motion for adjournment was supported by the affidavits of O'Keefe (R. 444-446) and his counsel LoPinto (R. 447-451), which detailed the facts in connection with O'Keefe's difficulties in employment of counsel and LoPinto's impossibility of adequate preparation of his defense by March 5, 1951. LoPinto requested an adjournment of at least a month in order that he might make adequate preparation (R. 451). Affidavit opposing the adjournment was made by District Attorney Bernstein, on March 5, 1951 (R. 3583-3586). Bernstein's affidavit sets out, in part, that on February 14, 1951, O'Keefe had declined to have counsel assigned to him and had stated that he would prepare his own defense.

On March 3, 1951, several of the other defendants, including petitioners Joseph and Mondolfi, joined in O'Keefe's motion for an adjournment and, in the alternative, moved for a severance in the event that an adjournment be denied (R. 452, 453-454). A supporting affidavit by these defendants' attorney, Harry S. Travis, pointed out the prejudice that would result to these defendants by being compelled to undergo joint trial with O'Keefe while O'Keefe's counsel was wholly unprepared for trial (R. 453-455). The other petitioners joined in this motion on March 5, 1951 (R. 553).

The foregoing motions for adjournment or, in the alternative, for severance, were orally argued before the Broome County Court on March 5, 1951 (R. 546-553). The court adopted the suggestion of District Attorney Bernstein that the trial be adjourned for one week because of "some other complications," not made a matter of record, which had arisen that morning "in regard to

other counsel in the case'' (R. 549), but otherwise denied the motions (R. 550, 552-553). Counsel then, on the same day, attended the hearing by the court of excuses of jurors until 12:20 P. M. (R. 556). Trial was then adjourned to March 12, 1951, on which day the drawing of the jury began (R. 467).

During the week of March 12, 1951, juror Bertha Whiting was accepted by all parties and duly sworn and seated as juror number 4 (R. 471, 3554-3564). Thereafter, on March 19, 1951, apparently because of an affidavit or affidavits which had been furnished to the court by the prosecution, the court conducted an *ex parte* examination of juror Whiting in chambers, questioning her as to the propriety of her serving as a juror (R. 3565, 3579). Neither defendants nor their counsel were advised that this juror would be so interrogated (R. 3570-3571, 3578, 3579), nor was any stenographic record made of the interrogation.

After this *ex parte* examination of juror Whiting, the court only then advised defense counsel that it had taken place. The court suggested to defense counsel that they consent to excuse juror Whiting to avoid a trial in open court of a challenge for cause under Section 371 of the New York Code of Criminal Procedure, as contemplated by the prosecution (R. 3571-3574, 3578, 3579). While after return of verdict against petitioners the court was "satisfied'' that this juror was "fair and impartial" (R. 3579), as of the date of this *ex parte* interrogation the court was doubtful whether she should be permitted to continue as a juror (R. 3573, 3578).

Defense counsel pointed out to the court the impropriety of his conduct as to the juror Whiting (R. 3573, 3578), and refused to consent to excusing the juror for the reasons stated in the affidavit of Paul R. Shanahan,

attorney for petitioner Romeo (R. 3574). On the same day, March 19, 1951, the court advised attorney Shanahan that the prosecution would not press a challenge for cause (R. 3574). Defense counsel reserved the right to make any appropriate motion with respect to this *ex parte* interrogation of juror Whiting at the close of the trial (R. 3683-3684), the court expressly consenting to such reservation (R. 3684). The record shows this reservation to have been made on March 26, 1951 (R. 561, 588), the date it was entered of record before the taking of any evidence (R. 588). The record, however, also shows the belief of defense counsel, manifested on motions to set aside the verdict, that the reservation was first made on March 19, 1951 (R. 3508, 3516, 3523, 3575, 3578). The court denied a subsequent motion to correct the record to show that the reservation was actually made on March 19, 1951 (R. 3673, 3679-3681, 3666).

The affidavit of juror Whiting (R. 3565-3569), made after verdict had been returned and the jury discharged, and presented in support of motions to set aside the verdict (R. 3506), sets out the manner in which she was psychologically affected by the above-described *ex parte* examination; further, that another juror knew of this interrogation (R. 3569).

On a day during the presentation of the evidence, another *ex parte* conversation took place between the court and juror Carlton Palmer, foreman of the jury, in chambers. This conversation was apparently with respect to whether the transcriptions of disk records of intercepted telephone conversations, received in evidence, would be available to the jury in the jury room during their deliberations (R. 3568-3569, 3580). This conversation was without notice to the defense; and defense counsel ascertained the apparent nature of it only after inquiry of the court (R. 3575-3577, 3578).

After the jury was sworn and before any evidence was offered, 36 felony counts of the indictment together with all counts against two defendants, were dismissed on concession of the prosecution that it had insufficient evidence to support them (R. 556-560). Petitioner O'Keefe remained charged in 60 felony counts; petitioner Romeo in 39; petitioner Joseph in 25; petitioner Mondolfi in 5; petitioner Saraceno in 4; petitioners Capalaces and Fiato each in 2. At the close of the prosecution's case, other counts, and another defendant, were dismissed (R. 3210-3212); the second misdemeanor count was dismissed as to several of the defendants at the close of the entire case (R. 3467). Some ten weeks had been spent in trial of the case. The verdict found all of the petitioners guilty on the first misdemeanor count; petitioner O'Keefe, in addition, was found guilty on ten felony counts (R. 3502-3503).

Petitioners' motions to set aside the verdicts, for new trial, for mistrial, and in arrest of judgment (R. 3506-3548), were denied in memorandum (R. 3579-3580). Sentence was imposed upon the petitioners on June 13, 1951 (R. 3552).

Appeal was taken by the petitioners to the Appellate Division, Third Judicial Department. On original argument the convictions were reversed (R. 3635-3647), Presiding Justice Foster and Associate Justice Bergan dissenting (R. 3648-3657). One of the two grounds for the reversal was that the improper communications between the trial court and the jurors Whiting and Palmer violated petitioners' substantial rights to a fair trial (R. 3642-3645).

Thereafter, the trial record was corrected and augmented to include proof offered as to the accuracy or reliability of transcriptions of telephone interceptions, the absence of which proof was the other ground for re-

versal by the Appellate Division on original argument, and also to include the trial court's express consent to the reservation by defense counsel to make any appropriate motion with respect to the *ex parte* interrogation of juror Whiting at the close of the trial (R. 3659-3779). At the instance of the prosecution, the Appellate Division then ordered a re-argument of the appeal in that court (R. 3616-3620).

Upon re-argument in the Appellate Division, that court reversed itself and affirmed the convictions (R. 3621-3633), Associate Justices Coon and Imrie dissenting (R. 3634). Between the time of the original reversal and re-argument in the Appellate Division, the membership of that court had changed, so that of the three Associate Justices who voted for reversal on original argument, namely Justices Heffernan, Brewster and Coon, only Justice Coon participated in the decision on re-argument. The original dissenters, Presiding Justice Foster and Associate Justice Bergan, became with newly added Associate Justice Halpern the majority of the court. Associate Justice Imrie, also newly added, joined in dissent in part with Associate Justice Coon after re-argument (R. 3634).

The dissenting justices on re-argument in the Appellate Division agreed that the convictions should be reversed because of the improper communications between the trial court and the jurors Whiting and Palmer, although Justice Imrie felt that the corrected record established that there was sufficient proof of the accuracy of the transcriptions of telephone interceptions (R. 3634).

The majority opinion for affirmance on re-argument in the Appellate Division (R. 3622-3633) holds that even though the communications may have been improper, the petitioners waived their rights to object thereto; that the reservation by defense counsel of the right to make

any appropriate motion with respect to the *ex parte* interrogation of juror Whiting at the close of the trial, to which the trial court expressly consented, was ineffectual to preserve the petitioners' rights to object.

On appeal to the New York Court of Appeals, the Court of Appeals affirmed the convictions below, without opinion, on November 20, 1953 (R. 3782-3783). Petitioners moved for re-argument or, in the alternative, for amendment of the remittitur to show that questions of due process under the Fourteenth Amendment to the United States Constitution were presented and passed upon by the Court of Appeals (R. 3783-3784). On January 21, 1954, the Court of Appeals denied petitioners' motion insofar as it sought re-argument, but granted the motion insofar as it sought amendment of the remittitur (R. 3784-3785).

Reasons for Granting the Writ.

The federal questions presented in this case are important and substantial, involving the administration of criminal justice in the state courts under the due process clause of the Fourteenth Amendment to the United States Constitution. Presented herein are federal questions decided by the New York courts which have not heretofore been determined by this Court, as well as federal questions decided by the New York courts in a way not in accord with applicable decisions of this Court.

1. This Court has very recently emphasized the impropriety, in a criminal case, of "any private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury." *Remmer v. United States,* U. S. , 74 Sup. Ct. 450, 451.

It would seem clear that, in a state prosecution for felony, the *ex parte* examination of a sworn juror by the trial court in chambers to inquire into the qualifications of such juror, without notice to defendant or his counsel, and without stenographic record being made of the examination, violates the right of the defendant to due process under the Fourteenth Amendment to the United States Constitution. Cf. *Snyder v. Massachusetts,* 291 U. S. 97. *Howard v. Kentucky,* 200 U. S. 164, is in no way authority to the contrary. In that case *counsel agreed* that the court might, in the absence of the defendant and his counsel, question one of the jurors already accepted whose qualifications had been placed in doubt. The court, after questioning the juror, ordered his discharge. The decision of this Court that the defendant, in *Howard v. Kentucky,* was not deprived of due process within the meaning of the Fourteenth Amendment, seemingly rests upon two grounds: first, that defendant and his counsel waived the right to be present at the questioning of the juror (see *Snyder v. Massachusetts,* 291 U. S. at 120-121); second, that due process requires only that an accused be tried by an impartial jury. *Howard v. Kentucky* is not authority that due process does not require trial by a jury which is impartial and untrammeled, especially by any improper conduct by a court.

The effect upon other jurors who learn of an *ex parte* examination such as here involved cannot be overlooked. In the instant case, another juror did know that juror Whiting had been examined in chambers by the trial court (R. 3569). The effect of such knowledge is most difficult to assay; certain it is that it was of no benefit to the defense.

At least after return of verdict against the petitioners herein, the Broome County Court was "satisfied" that the juror interrogated *ex parte* was "fair and impartial"

(R. 3579). This Court has stated that, "So far as the Fourteenth Amendment is concerned, the presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only." *Snyder v. Massachusetts*, 291 U. S. at 107-108. It is dangerous doctrine, which strikes at the very heart of the right to a fair and just hearing, that the trial court may "satisfy" itself by *ex parte* examination that a juror is "fair and impartial." The importance of this question, for the purpose of grant of writ of certiorari by this Court, cannot be over-emphasized.

2. The circumstances under which a constitutional right may be waived of course presents a question just as important and substantial as that concerning existence of the right. The majority of the Appellate Division, Third Judicial Department, State of New York, held on re-argument (R. 3622-3633), the New York Court of Appeals affirming, that the petitioners waived their rights to object to the *ex parte* interrogation of the juror Whiting by the trial court by failing to move with respect thereto until after verdict: "The defendants' counsel did not ask that the juror be excused because of any alleged prejudicial effect of the private interview by the Judge, nor did they ask to be allowed to examine Mrs. Whiting further, nor did they move for a mistrial or for any other relief" (R. 3625-3626).

With respect to the express reservation of right to move at the close of the trial as to this interrogation, specifically acquiesced in by the trial court (R. 3683-3684), the majority of the Appellate Division said on re-argument, "the defendants elected to retain the juror and to accept the whole jury of which she was a part and to proceed with the trial. Having made this election, there was nothing left which the defendants could re-

serve as the basis for an attack at the close of the trial. If it was the defendants' claim that, as a result of the episode, the juror was disqualified or unfit, it was their duty to present that claim then and there * * *" (R. 3627). Further, the majority opinion of the Appellate Division on re-argument goes on, "No motion upon the basis of the juror episode was made at the close of the trial; obviously, the defendants did not wish to have any action taken by the court before the jury reported its verdict; they wanted to save the point as a trump card to be used on a motion for a new trial after verdict, in the event that the verdict went against them" (R. 3629).

With respect to waiver of constitutional rights, this Court has said (*Johnson v. Zerbst*, 304 U. S. 458, 464):

> It has been pointed out that "courts indulge every reasonable presumption against waiver" of fundamental constitutional rights and that we "do not presume acquiescence in the loss of fundamental rights." A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege.

Johnson v. Zerbst involved waiver of the right to counsel and this Court went on to say that, "The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case * * *" (*ibid*).

The particular facts and circumstances surrounding the instant case show that there was no waiver of the petitioners' rights to object to the *ex parte* interrogation of the juror Whiting. Section 371 of the New York Code of Criminal Procedure provides:

> A challenge must be taken when the juror appears, and before he is sworn; but the court may, in its discretion, for good cause, set aside a juror at any time before evidence is given in the action.

A challenge for cause is to be tried in open court in accordance with Sections 381-384 of the New York Code of Criminal Procedure. The prosecution did not try out a challenge to the competency of the juror Whiting, and the majority opinion on re-argument of the Appellate Division obscures the fact that the petitioners complain not as to the competency of the juror Whiting at the time of her acceptance, but that the conduct of the trial court phychologically affected her so as to undermine her freedom of thought and action.

The situation in this case is to be contrasted with that in *Queenan v. Oklahoma*, 190 U. S. 548. There it developed in the course of the trial that one of the jurors had been convicted of a felony, contrary to his statement on the *voir dire*. The trial court indicated to defense counsel that if the defense pressed an objection the juror would be excused, thereby necessitating a new trial. Defense counsel answered that the defense had nothing to say. Under these circumstances, involving competency of a juror and not in any way misconduct of the trial court, this Court quite properly held that the objection to the juror's competency had been waived.

The majority opinion notes that the defense did not ask that the juror be excused. But, if under the facts of this case, a defendant must request that a juror improperly questioned by the trial court be excused, thereby condoning the improper conduct of the trial court, the court may accomplish indirectly, by an improper *ex parte* examination, what has not been attempted directly, a challenge for cause.

The majority opinion notes that the defense did not ask to be allowed to examine Mrs. Whiting further. But, it is doubtful that such an examination could have served any purpose as of the date of the *ex parte* inter-

rogation; it is well-known that psychological effects are sometimes slow to develop; further, additional examination as of that time may have become known and have antagonized the entire panel.

Finally, the majority opinion of the Appellate Division on re-argument notes, the defense did not move for a mistrial. It may well be that a motion for mistrial could have been made at the time of the *ex parte* examination. But the trial court specifically acquiesced in the reservation of rights by defense counsel before the taking of any evidence; whether this reservation and acquiescence occurred on March 19, 1951, or March 26, 1951, would seem to be immaterial. The effect of this *ex parte* examination upon juror Whiting could be determined only by examination after verdict. See *Remmer v. United States,* U. S. , 74 Sup. Ct. 450. The majority opinion of the Appellate Division on re-argument further overlooks the fact that, inasmuch as the trial court was "satisfied" that the juror interrogated *ex parte* was "fair and impartial" (R. 3579), a motion for mistrial would undoubtedly have been denied.

The majority opinion of the Appellate Division on re-argument draws a distinction between "close of trial" and "rendition of verdict" for the purpose of a motion by the defense based on the *ex parte* examination of juror Whiting. Obviously, at the "close of trial" in the sense of close of the evidence, would place the defense in no different position than they were following disclosure of the incident. Necessarily, the court intended "close of trial" to mean exactly what defense counsel construed it to mean—the right to move after an affidavit could be secured from the juror or the juror summoned into court for interrogation. The motion before the trial court following the rendition of the verdict was

not limited to a motion for new trial; motion for mistrial was also made based on affidavit of the juror as well as motion in arrest of judgment (R. 3506-3548). That the trial court recognized the right to move for mistrial had been reserved until after verdict, is adequately shown by the court entertaining the application and deciding it in short memorandum wherein no question was raised of the right of defense counsel to move for a mistrial at the time the motion was made following the receipt of the juror's affidavit (R. 3579).

The particular facts and circumstances surrounding the instant case show not only that there was no waiver of defendants' constitutional rights, but that defense counsel at all times affirmatively sought to preserve such rights. It is not believed that this Court has upheld a finding of waiver of constitutional rights under any facts and circumstances analogous to those presented here. Cf. *Howard v. Kentucky,* 200 U. S. 164.

3. This case involves as to improper communications between the trial court and jurors not only the *ex parte* examination of a juror but also an *ex parte* conversation between the trial court and the foreman of the jury. True, this conversation was explained, as being in reference to the right of the jury to take certain exhibits into the jury room during their deliberations. However, the fact remains that the conversation was *ex parte* and without stenographic record. The defense has only the trial court's explanation of what occurred. On the basis of the trial court's explanation of the occurrence, the defense cannot show actual prejudice. But, it is not believed that due process permits such *ex parte* conversation between the trial court and the foreman of the jury to take place during the trial of a state felony prosecution, with the burden on the defense to show

prejudice based on the trial court's explanation of what occurred. This Court has never sanctioned trial *in camera.*

4. The majority of the Appellate Division, Third Judicial Department, State of New York, held on re-argument (R. 3631-3632), the New York Court of Appeals affirming, held that the defense waived their right to object to the *ex parte* conversation between the trial court and the foreman of the jury by not making the objection until after verdict. The objection was raised in defendants' motions after verdict (R. 3506-3548). The trial court's memorandum denying these motions would seem to make it clear that it would have been futile for the defense to have moved for a mistrial at that point (R. 3580); indeed, the record shows that defense counsel learned the apparent nature of this conversation only by questioning the judge about it (R. 3575-3577, 3578).

5. Under the particular facts and circumstances of this case and applicable decisions of this Court, the right of the petitioner Raymond O'Keefe to due process under the Fourteenth Amendment was violated by refusal of the trial court to adjourn the trial for the period necessary for newly added defense counsel to adequately prepare for trial.

The record in this case, as previously set forth in "Statement of the Case," shows that petitioner O'Keefe was unable to obtain counsel to represent him until March 2, 1951, with the trial scheduled to commence on March 5, 1951, and that his efforts to obtain counsel had been diligent despite his statement in a moment of rashness that he did not want counsel assigned to him and that he would prepare his own defense. O'Keefe's counsel, John LoPinto, employed on March 2, 1951, was faced with an indictment containing 2 misdemeanor and

98 felony counts against his client. It was obviously impossible for him to even digest the indictment sufficiently to have the multitude of allegations in mind in the few days available to him.

In addition to the great multitude of charges against O'Keefe, attorney LoPinto was faced with the fact that the jury panel was comprised of some 393 veniremen (R. 457-464). Obviously, in the few days between his retainer and the date set for trial attorney LoPinto, who had his office in Ithaca and not in Binghamton, New York, could not familiarize himself with the background of these veniremen. The trial court did adjourn the trial for one week, giving attorney LoPinto from around noon on March 5 to March 12, 1951, to study the backgrounds of the veniremen who remained, digest and master the allegations of the indictment with its multitude of ramifications involving alleged conspiracies among 18 persons over a period of years and 100 counts against O'Keefe, besides interviewing his client and witnesses. Obviously, this could not be done adequately.

The indictment in this case returned on June of 1950 was the culmination of months of investigation of the Grand Jury (R. 3583). The prosecution had additional months in which to prepare further in this case, between the date of the indictment and the date set for trial. The prosecution, as shown in the record, had numerous investigators, state police, special agents, and sheriff's department and assistants to aid in preparation. Some ten weeks were spent in trial of this case.

To be contrasted with the refusal of the trial court to grant more than a week's adjournment is the action of the trial court in granting to the prosecution, in the midst of trial, a week's adjournment to enable the special prosecutor to attend to private business (R. 2363-2368, 2394-2395).

It is apparent, under all of the facts and circumstances of this case, that even if counsel had been assigned to O'Keefe on or about February 14, 1951, such assigned counsel would not have had an adequate opportunity to prepare his defense.

This Court has stated that (*Powell v. Alabama*, 287 U. S. 45, 59):

> The prompt disposition of criminal cases is to be commended and encouraged. But in reaching that result a defendant, charged with a serious crime, must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense. To do that is not to proceed promptly in the calm spirit of regulated justice but to go forward with the haste of the mob.

The situation in this case is distinguishable from that in *Avery v. Alabama*, 308 U. S. 444. The offenses for which petitioner O'Keefe was convicted were alleged to have occurred in an urban county, and O'Keefe's attorney was not from that county. The charges in *Avery v. Alabama* were of a simple nature, not presenting the ramifications of the 102-count indictment and ten weeks' trial in the instant case.

6. Under the particular facts and circumstances of this case, the rights of the petitioners other than O'Keefe to due process under the Fourteenth Amendment were violated by refusal of the trial court either to adjourn the trial for the period necessary for O'Keefe's newly added defense counsel to adequately prepare for trial, or to grant a severance to such petitioners.

The petitioners here were on trial for conspiracy, and it was prejudicial to them to be compelled to undergo joint trial with a defendant unprepared. Cf. *Krulewitch v. United States*, 336 U. S. 440. Petitioners concede that the matter of a severance is ordinarily within the dis-

cretion of the trial court; they contend, however, that in a situation of this type the refusal to grant a severance where adjournment has been denied, is so prejudicial as to constitute a deprivation of due process. This contention does not appear to have been squarely passed upon by this Court.

7. Under the particular facts and circumstances of this case, the cumulative effect of the errors complained of was a trial which violated the rights of the petitioners to due process under the Fourteenth Amendment. As stated in *Malinski v. New York*, 324 U. S. 414, 416-417, judicial review of claimed violations of the due process clause "inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples * * *"

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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